

Decision 06-05-043

May 25, 2006

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Applications of the Coastal Alliance on  
Plant Expansion and City of Morro Bay  
for Rehearing of Resolution E-3929  
Regarding Pacific Gas and Electric  
Company Advice Letter 2632-E

A.05-05-010  
(filed May 6, 2005)

A.05-05-013  
(filed May 11, 2005)

**ORDER MODIFYING AND DENYING REHEARING OF  
RESOLUTION E-3929, AND CONSOLIDATING  
DOCKETS A.05-05-010, AND A.05-05-013**

On February 23, 2005, Pacific Gas and Electric Company (PG&E) filed Advice Letter (AL) 2632-E, requesting Commission approval of a three-year physical tolling agreement with Duke Energy Marketing Americas (Duke) concerning purchase of the output of Duke's Morro Bay Generation Units 3 and 4.<sup>1</sup> In its filing, PG&E requested that substantial portions of AL 2632-E, including the agreement between PG&E and Duke,<sup>2</sup> be treated as protected material in accordance with an April 4, 2003 modified protective order in *Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development*, Rulemaking (R.) 01-10-024. PG&E requested an approval date of April 4, 2005.

On March 15, 2005, the City of Morro Bay (City) and Coastal Alliance on Plant Expansion (CAPE) filed timely protests to AL 2632-E. The protests included arguments that Duke had no authority to utilize the ocean outfall that is essential to the

<sup>1</sup> The agreement is part of PG&E's procurement plan.

<sup>2</sup> On February 23, 2005, PG&E submitted the proposed agreement in its AL-2632-E as "Confidential Appendix A."

operation of the Duke Morro Bay Generation Units 3 and 4, which are the subjects of the contract, because its lease to operate the facility (“outfall lease”) had expired in 2004.<sup>3</sup> In addition, both the City and CAPE argued that the agreement and related documents should not be kept confidential. CAPE requested a formal hearing.

On March 29, 2009, the Commission’s Energy Division (ED or staff) mailed a draft resolution to the parties that approved the agreement “contingent on the resolution of the lease issue [between Duke and the City] in a manner that allows Duke to lawfully operate the units.” In addition, the draft resolution considered the City to be a “non-market participant” and permitted non-market participants to have access to confidential portions of the AL provided they entered into a non-disclosure agreement. In issuing the draft resolution the staff notified the parties that the draft resolution would be considered at the Commission’s April 7, 2005 public meeting and that the Commission “may adopt all or part of it a written, amend, modify or set it aside and prepare a different [r]esolution.” Parties were further informed of an expedited comment period, pursuant to Public Utilities Code section 311, subdivision (g)(2), with comments not to exceed five pages in length, due on April 4, 2005.<sup>4</sup> Reply comments were prohibited.

On April 4, 2005, the City submitted comments on the draft resolution indicating it would enter into a non-disclosure agreement. Also on April 4, 2005, CAPE submitted comments on the draft resolution objecting to it on substantive and procedural grounds, including alleging that the draft resolution violated section 311, subdivision (g). At its April 7, 2005 meeting the Commission issued a revised resolution, Res. E-3929, that approves the agreement between Duke and PG&E on the assumption that the matter will be resolved so that Duke may lawfully operate the facility. In addition, Res. E-3929 rejects the protests regarding the confidentiality of AL 2632-E and finds there is no need for a formal hearing. Rather than permitting non-

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<sup>3</sup> Finding of Fact No. 7 of Resolution (Res.) E-3929 contains a typographical error and mistakenly provides that the outfall lease expired on November 14, 2005.

<sup>4</sup> Hereinafter, all statutory references are to the Public Utilities Code unless otherwise indicated.

market participants, upon signing a non-disclosure agreement, to have access to the confidential documents, Res. E-3929 requires the confidential portions be kept confidential for a period of six months, and then made public.

Both CAPE and the City filed timely applications for rehearing of Res. E-3929. The City contends that Res. E-3929 is unlawful for the following reasons: (1) Duke's outfall lease has expired and it is no longer lawfully operating the facility; (2) the Commission did not provide an opportunity to the City to review material provisions of AL 2632-E and therefore the Commission violated section 454.5, subdivision (g) and section 583, as well Commission rules and past decisions and orders; and (3) that the modifications to the proposed draft resolution were material and substantial and therefore constituted an alternate resolution and that the Commission failed to provide the requisite notice and opportunity to comment on that alternate resolution. CAPE alleges that: (1) the comment period for the draft resolution was erroneous; (2) the Commission improperly invoked section 311, subdivision (g)(2); (3) the draft resolution was so substantially modified it became an alternate and the Commission erred in not providing the requisite process pursuant to section 311, subdivision (g)(1); (4) Res. E-3929 fails to contain the requisite findings and that the Commission abused its discretion in failing to provide any evidentiary support for its findings and conclusions; and (5) that under the California Public Records Act (CPRA), the Commission has erred in protecting from public disclosure certain information submitted by PG&E as confidential.

On May 31, 2005, PG&E filed a petition for modification of Res.E-3929, requesting modification of Ordering Paragraph No. 2 which ends the confidential treatment of the appendices to PG&E's AL 2632-E six months after issuance of Res. E-3929. PG&E also wrote the Commission's Executive Director on September 21, 2005 requesting an extension of the confidentiality of the PG&E documents until fifteen days after the issuance of this order, which the Executive Director granted by letter dated October 4, 2005. That extension is still in effect. PG&E's petition for modification will

be reviewed, in a separate docket, by a later Commission decision or order. Nothing in this decision prejudices the outcome of that petition.

On February 6, 2006, our General Counsel received a letter from the City stating in part that “the issues raised in the City[’s] ... [application for rehearing] are moot.” However, to date, the City has not withdrawn its application for rehearing of Res. E-3929.

Neither PG&E’s AL 2632-E, nor Res. E-3929, have an assigned docket number. Consequently each of the applications for rehearing of Res. E-3929 have different docket numbers. By this decision we consolidate those dockets.

## **I. DISCUSSION**

### **A. The lease dispute issue did not necessitate a hearing because it was not a material issue before the Commission.**

CAPE contends that the dispute between the City and Duke regarding the outfall lease was a material issue that required an evidentiary hearing. Res. E-3929 addresses this issue and concludes that the outfall lease dispute is not a matter requiring resolution by the Commission. Res. E-3929 provides:

While we cannot ignore the fact that there is a legal dispute over the need for an existing outfall lease, we note that the dispute is between the City and Duke. PG&E’s agreement with Duke includes provisions to make the contract null and void should the facility be unable to lawfully operate. [footnote omitted] We will approve the agreement with the understanding that the City and Duke will continue to work to resolve the lease issue in a manner that allows Duke to lawfully operate the units. While we encourage the City and Duke to resolve the outfall lease, our approval implies that Duke will be able to lawfully operate the units.

(Res. E-3929 at p. 6, emphasis added.)

The outfall lease is not a material issue necessitating resolution by the Commission prior to reviewing the Duke-PG&E agreement at issue. However, dicta in Res. E-3929 contains some language which may be construed as conveying a conditional approval. The condition implied is that the City and Duke resolve their

lease dispute to permit Duke to operate the units lawfully. Since Res. E-3929 clarifies that approval of AL 2632-E does not require the Commission's resolution of the lease dispute between Duke and the City, the language added on this topic is somewhat inconsistent and entirely unnecessary. We shall modify Res. E-3929 as set forth herein, to delete the confusing language.

**B. Confidential treatment of material in Res. E- 3929.**

Pursuant to Res. E-3929, the confidential information was to have become public after six months time. That period has been extended by Executive Director letter only. CAPE has expressed willingness to enter into a non-disclosure agreement. R.01-10-024, which is based on section 454.5 and upon which PG&E relied in requesting portions of AL-2632-E be treated as confidential, permits confidential information to be accessible to non-market participants, provided the non-market participant enters into a non-disclosure agreement.

We shall modify Res. E-3929 to provide that non-market participants are entitled to access to all confidential documents if they sign a non-disclosure agreement as contemplated in R.01-10-024.

In addition, CAPE also challenges any need for it to execute a non-disclosure agreement with respect to PG&E's AL 2632-E. CAPE contends that the confidentiality accorded to the AL's appendices in this matter is contrary to the California Public Records Act (CPRA). Citing Government Code section 6250,<sup>5</sup> CAPE argues that in this instance, it is entitled to the information presented by PG&E as confidential. CAPE contends that under the Government Code section 6255, a public agency, such as the Commission, must justify withholding documents from the public by affirmatively demonstrating that "the public interest served by not disclosing the record *clearly outweighs* the public interest served by disclosure of the record."

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<sup>5</sup> Government Code section 6250 provides: "...the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (See also, Cal. Const. Art. I, § 3(b)(2).)

Admitting that an agency may withhold from public disclosure a document that is subject to an express statutory exemption, CAPE argues that in this proceeding, “no party claims that the Advice Letter appendices fall under such an exemption, nor could they, since no such express exemption exists in this case.” (CAPE application for rehearing at p. 6, footnote no. 2.) Further, CAPE argues that we never affirmatively demonstrated that the public interest was best served by keeping the documents deemed confidential by PG&E from the public.

In *Southern California Edison Company v. Westinghouse Electric Corporation* (1989) 892 F.2d 778, 783, the court stated:

On its face, § 583 does not forbid the disclosure of any information furnished to the CPUC by utilities. Rather, the statute provides that such information will be open to the public if the commission so orders, and the commission's authority to issue such orders is unrestricted. Moreover, even in the absence of an order by the commission, the information may be made public by an individual commissioner during a commission hearing.

(*Southern California Edison Company, supra*, 892 F.2d at p. 783.)

*Southern California Edison Company* clarifies that material submitted to the Commission under section 583 is public information that the Commission may keep confidential. It is also information that the Commission may make public, which Res. E-3929 did.

We believe that our decision to make all the documents public six months after we issued Res. E-3929, as well as the modifications we hereby make to Res. E-3929, permitting non-market participants who sign a non-disclosure agreement to have access to the confidential documents, will provide CAPE with the remedy it seeks and renders CAPE's argument moot.

### **C. Revision of a draft resolution.**

CAPE alleges Res. E-3929 errs in modifying the draft resolution and not providing adequate notice of the modification and an opportunity to comment on it. CAPE contends that the modification constitutes a substantive revision that prevented

its meaningful participation and materially changed the outcome of the resolution, rendering it an alternate.

In ultimately adopting a final decision, the Commission may modify or even set aside any part or the entirety of a proposed decision (PD). Pursuant to section 311, subdivision (e), an alternate decision must appear on the Commission's public agenda, noting its status as an alternate and must "be served upon all parties to the proceeding without undue delay and shall be subject to public review and comment before it may be voted upon." (See also, § 311(g).) Subdivision (e) of section 311 defines an alternate decision. An alternate "means either a substantive revision to a proposed decision that materially changes the resolution of a contested issue or any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs." (§ 311(e).) Section 311 applies to Commission resolutions.

Ordering Paragraph No. 2 of the draft resolution would have required PG&E to provide access to the confidential information to any non-market participant, upon signing a non-disclosure agreement, consistent with the modified protective order adopted in Rulemaking (R.) 01-10-024. As noted above, Ordering Paragraph No. 2 of Res. E-3929 does not contain the language from the draft resolution but instead provides: "The Advice Letter and appendices shall remain confidential for a period of 6 months after which it will be made publicly available in its entirety." (Res. E-3929 at p. 10.)

Revisions to a PD that constitute more than a mere editorial change and result in a substantive change that affects the outcome of the proposed decision constitute an alternate decision. (§ 311(e); compare with *Monasky v. Citizens Communications* (1999) \_\_\_ Cal.P.U.C.2d \_\_\_ (D.99-08-029), 1999 Cal.PUC LEXIS 436, a decision denying an application for rehearing where the changes made by the sponsoring Commissioner to a PD were "editorial" and did not change the outcome of the PD.) Since we are modifying Res. E-3929 to essentially restore the language from the draft resolution that orders PG&E to provide non-market participants with access to

the entire AL provided those non-market participants sign a non-disclosure agreement, CAPE's allegation of error is moot.

**D. Requirements of adequate notice and opportunity to comment may be shortened under certain circumstances.**

Finally, CAPE contends that Res. E-3929 improperly invoked the emergency waiver provision of section 311, subdivision (g)(2), which provides:

The 30-day period may be reduced or waived in an unforeseen emergency situation, upon the stipulation of all parties in the proceeding, for an uncontested matter in which the decision grants the relief requested, or for an order seeking temporary injunctive relief.

CAPE argues that none of the circumstances set forth in subdivision (g)(2) existed. In its AL 2632-E, PG&E stated its desire for Commission approval by April 4, three days prior to April 7 Commission meeting in which Res. E-3929 issued, but does not provide why the date of April 4 is significant. Under section 454.5, procurement proceedings are to be handled in an expeditious manner and thus, section 454.5 provides ample reason under law for shortening time. (§ 311(d).) We shall modify Res. E-3929 to add a Conclusion of Law on this point.

A second April 2005 Commission meeting was scheduled for April 21, 2005. It may have been possible for the Commission to provide a shortened comment period on the modified version of the resolution prior to the April 21, 2005 meeting. However, we have, by this order, modified Res. E-3929 to permit non-market participants to enter into non-disclosure agreements regarding the confidential information, which was an outcome contemplated by the draft resolution. In view of the modification we are making to Res. E-3929, this issue is moot.

**II. CONCLUSION**

The dockets for the City's and CAPE's applications for rehearing of Res. E-3929 should be consolidated. We believe that modification of Res. E-3929 is warranted as discussed herein. In view of the modifications we now order, upon reviewing each and every allegation of error raised by the City and CAPE and for all of



the foregoing reasons, we find there is no merit supporting the applications for rehearing of Res. E-3929, as modified.

Therefore **IT IS ORDERED** that:

1. Dockets A.05-05-010 and A.05-05-013 are consolidated.
2. Ordering Paragraph No. 1 of Resolution E-3929 is modified by deleting the second sentence as follows:
  1. The request of Pacific Gas & Electric Company (PG&E) for Commission approval of a three-year tolling agreement with Duke's Morrow Bay Units 3 and 4 is approved. ~~Our approval implies resolution of the outfall lease in a manner that allows Duke to lawfully operate the units.~~
3. Ordering Paragraph No. 3 is added as follows:
  3. Consistent with the protective order in R.01-10-024, PG&E will make available the advice letter in its entirety to any non-market participant once they have signed a non-disclosure agreement as provided for in the modified protective order adopted in Rulemaking (R.) 01-10-024.
4. Finding of Fact No. 3 should be modified to add a comma after March 15, 2005, and the following phrase after "2005,":

"and filed timely comments on the draft resolution."
5. Finding of Fact No. 7 is modified to correct the date to November 14, 2004, by deleting the year "2005" and adding in its place the year "2004" as follows:

"Duke's 50-year outfall lease expired on November 14, 2004."
6. Finding of Fact No. 9 is deleted.
7. Conclusion of Law No. 1 is added as follows:
  1. Because the outfall lease dispute between Duke and the City is not material to the Commission's determination of whether to approve the Duke-PG&E agreement contained in AL-2632-E, there is no need for the Commission to conduct an evidentiary hearing on the outfall lease dispute.
8. Conclusion of Law No. 2 is added as follows:
  2. Public Utilities Code section 454.5, subdivision (b)(7) requires the Commission to ensure electric procurement plans receive an expedited approval process. In order to accommodate the expedited approval process and under the circumstances in this proceeding, there is a need to

reduce the normal 30-day review and comment period provided under section 311 for comments on the draft resolution and to prohibit reply comments.

9. The application for rehearing of Resolution E-3929 as modified herein, filed by the City of Morro Bay is denied.

10. The application for rehearing of Resolution E-3929 as modified herein, filed by Coastal Alliance on Plant Expansion is denied.

11. This proceeding is closed.

This order is effective today.

Dated May 25, 2006, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
GEOFFREY F. BROWN  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
Commissioners